

In The

JOSÉ P. SPANOL, JR.
CLERK

Supreme Court of the United States

October Term, 1988

0

SHERRI SPILLANE,

Petitioner.

VS.

FRANK MORRISON SPILLANE,

a/k/a MICKEY SPILLANE,

Respondent.

0

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA

0

RESPONDENT'S BRIEF IN OPPOSITION

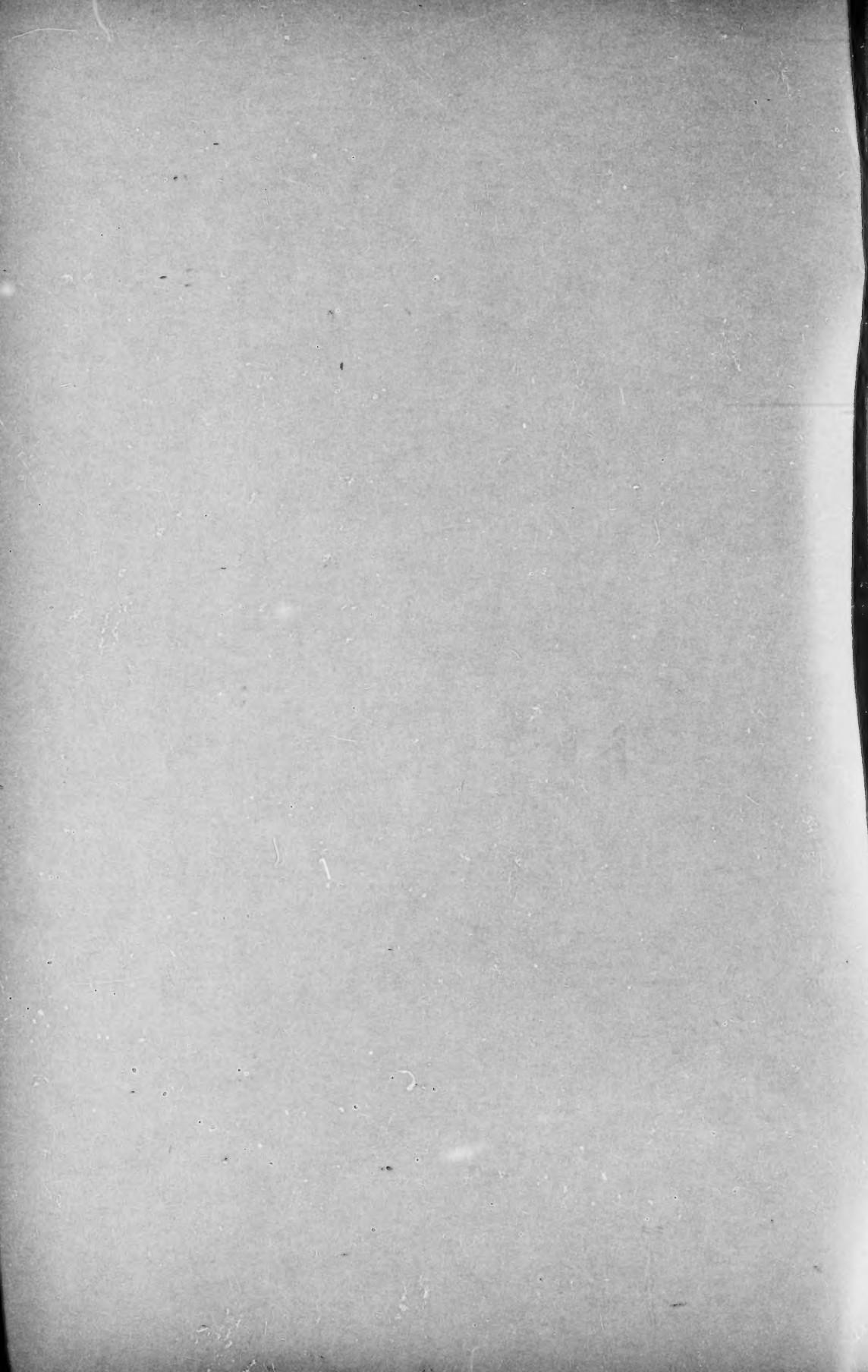
0

Charles E. Thompson*
Donald J. Green*
Thompson & Harper, Ltd.
703 S. Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 382-3652
Attorneys for Respondent

*Counsel of Record

*On the Brief

285
Cust. 5



CLARIFICATION OF THE QUESTIONS PRESENTED
BY PETITIONER

I

Whether the following unpublished Orders of the Nevada Supreme Court, which were issued to halt Petitioner's procedural defaults and abuses of Nevada's Appellate proceedings, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States and Section 362(a) of Title 11, United States Code:

A. October 16, 1986 Order permitting Petitioner's Nevada counsel to withdraw as counsel of record?

B. October 30, 1986 Order denying reconsideration of the Order permitting Nevada counsel to withdraw as counsel of record?

C. September 23, 1987 Order, ordering Petitioner to seek Nevada counsel as required by law, sanctioning Petitioner for filing and processing frivolous appeals, and denying Petitioner's Motion for the appointment of Nevada counsel for a civil appellant in a divorce action?

D. October 29, 1987 Order dismissing Petitioner's May 22, 1985 Appeal due to Petitioner's failure to file a brief and the record in accordance with express, clear Orders of the Nevada Supreme Court?

II

Whether certiorari jurisdiction should be exercised to review the Nevada Supreme Court's Order dated October 29, 1987 which dismissed Petitioner's Appeal due to her flagrant abuses and outright defiance of the Nevada Supreme Court under circumstances demonstrating that Nevada Supreme Court Rule 47 is not a jurisdictional bar to prevent that court from controlling litigants in Nevada Appeals?

III

Whether this Court should review, under State action principles of the due process clause of the Fourteenth Amendment to the Constitution of the United States, the trial court's assessment of the fairness of Petitioner's uncontested divorce action?

TABLE OF CONTENTS

	<u>PAGE</u>
CLARIFICATION OF THE QUESTIONS PRESENTED BY PETITIONER	i
TABLE OF AUTHORITIES	viii
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
JURISDICTION	1
DECISIONS BELOW	2
RELEVANT STATUTES AND RULES OF COURT INVOLVED	4
STATEMENT OF THE CASE	
A. <u>April, 1983:</u> Petitioner's Uncontested Nevada Divorce and the Amended Divorce Decree	5
B. <u>August, 1984 to July, 1986:</u> The Litigation Initiated By Petitioner to Challenge the Validity of the Divorce Decree	7

C. <u>August, 1986 to March, 1988:</u> The Appeals Initiated By Petitioner And The Dismissal of These Appeals	10
--	----

ARGUMENT IN OPPOSITION TO PETITIONER'S
"REASONS" FOR GRANTING THE WRIT OF
CERTIORARI:

I. <u>REVIEW BY CERTIORARI WILL WASTE JUDICIAL RESOURCES BY CONSIDER- ING NEVADA SUPREME COURT ORDERS WHICH SANCTIONED THE PROCEDURAL DEFAULTS AND ABUSES OF NEVADA'S APPELLATE PROCESSES BY PETITIONER AND HER COUNSEL . . .</u>	14
A. The "Questions" Raised Are Not Sufficiently Important to Warrant Certiorari	15
B. The Nevada Supreme Court Orders Did Not Violate Due Process	18
1. The October 16, 1986 Order Permitting Petitioner's Licensed Nevada Counsel to Withdraw Was Proper . .	18

2.	The September 23, 1987 Order Was Proper Because the Nevada Supreme Court Was Under No Duty to Appoint Counsel for Petitioner, a Civil Appellant	20
3.	The October 29, 1987 Order Dismissing Petitioner's Appeals Was Proper	22
C.	The Nevada Supreme Court Orders Did Not Violate Section 362(a), Title 11, United States Code	23
II.	<u>THERE IS NO BASIS FOR EXERCISING CERTIORARI JURISDICTION TO REVIEW THE CLAIM THAT PETITIONER WAS DENIED DUE PROCESS ON THE THEORY THAT HER APPEALS COULD NOT BE DISMISSED, ALTHOUGH PETITIONER SERIOUSLY MISCONSTRUED NEVADA SUPREME COURT RULE 47 CONCERNING REMOVAL OF AN ATTORNEY</u>	24
III.	<u>THERE IS NO CERTIORARI JURISDICTION TO REVIEW THE PROPRIETY OF AN APRIL, 1983 UNCONTESTED "QUICKIE" DIVORCE PROCURED BY PETITIONER</u>	26

	<u>PAGE</u>
A. Any Review of the April, 1983 Divorce Decree is Time Barred	26
B. Certiorari to Review a Trial Court Decree, from Which an Appeal Was Not Timely Exhausted, is Unavailable	27
C. Certiorari Should Not Be Granted to Review a "Quickie" Divorce Procured Through Petitioner's Probable Perjury	28
CONCLUSION	29
APPENDIX	
I. Nevada Supreme Court Order 9/25/85	
II. Nevada Supreme Court Order 9/04/86	
III. Nevada Supreme Court Order 10/06/86	
IV. Nevada Supreme Court Order 10/16/86	
V. Nevada Supreme Court Order 9/23/87	

- VI. Nevada Supreme Court Order Dismissing Appeals 10/29/87
- VII. Nevada Supreme Court Order Denying Rehearing 3/30/88
- VIII. Nevada Trial Court Decision 7/16/86
- IX. Constitutional Provisions,
Federal and State Statutes,
and Court Rules

Appendices I through VIII have
been lodged as directed by the
United States Supreme Court Clerk.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Association of St. Croix Condominium Owners v. St. Croix Hotel, 682 F.2d 446 (3rd Cir. 1982)</u>	23
<u>Black v. Cutter Laboratories, 351 U.S. 292 (1956)</u>	15
<u>Central Union Telephone Company v. City of Edwardsville, 269 U.S. 190 (1925)</u>	17
<u>Fox Film Corporation v. Muller, 296 U.S. 207 (1935)</u>	15
<u>Hammerstein v. Superior Court of California, 341 U.S. 491 (1951)</u>	17
<u>Herb v. Pitcairn, 324 U.S. 117 (1945)</u>	15
<u>In Re Convention Masters, Inc., 46 B.R. 339 (Bankr.D.Md. 1985)</u> . .	23
<u>In the Matter of Smiley, 330 N.E. 2d 53, 369 N.Y.Supp. 87 (1975)</u>	21

<u>Layne & Bowler Corporation v.</u> <u>Western Well Works,</u> 261 U.S. 387 (1923)	18
<u>Minneapolis, St. Paul & SSM</u> <u>Railroad Company v. Rock,</u> 279 U.S. 410 (1929)	27
<u>National League of Cities v. Usery,</u> 426 U.S. 833 (1976)	21
<u>Newman v. Gates,</u> 204 U.S. 89 (1907)	17,23
<u>Phyle v. Duffy,</u> 334 U.S. 431 (1948)	17,23
<u>Rice v. Sioux City Memorial Park</u> <u>Cemetery,</u> 349 U.S. 70 (1955)	16
<u>Rogers v. Rogers,</u> 671 P.2d 160 (Utah 1983)	14,24
<u>Virginian Railroad Company v.</u> <u>Mullins,</u> 271 U.S. 220 (1926)	27
<u>Zucht v. King,</u> 260 U.S. 174 (1922)	16

UNITED STATES CONSTITUTIONU.S. Const. amend. XIV passimSTATUTES11 U.S.C. § 362(a) passim

28 U.S.C. § 2101(c) 2,26

28 U.S.C. § 1257 2,27

Nevada Revised Statute 125.020 . . . 3,6

Nevada Revised Statute 199.120 . . . 3,28

COURT RULES

U.S. Supreme Court Rule 17.1 . . . 2

Nevada Rule of Appellate Procedure
27(c) 3,19

Nevada Supreme Court Rule 47 ii,3,24

Nevada Supreme Court Rule 123. 3

Nevada Rule of Civil Procedure
60(b) 2,7

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

SHERRI SPILLANE,
Petitioner,

vs.

FRANK MORRISON SPILLANE,
a/k/a MICKEY SPILLANE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA

Respondent hereby submits this brief
in opposition to the Petition for a Writ
of Certiorari.

JURISDICTION

Respondent respectfully submits that
there is no jurisdiction to grant the
Writ.

DECISIONS BELOW

The unpublished Orders of the Nevada Supreme Court and the Decision of the trial court are reproduced in their entirety in Appendices I through VIII. The challenged Orders are not "opinions" because the Nevada Supreme Court is empowered to issue such orders in unpublished form as may be necessary to the proper disposition of matters presented for its review.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

For the convenience of this Honorable Court, the relevant constitutional provisions, statutes, and rules of court are set forth verbatim in Appendix IX but are immediately noted as follows:

- (a) U.S. Const. amend. XIV;
- (b) 28 U.S.C. § 1257;
- (c) 28 U.S.C. § 2101(c);
- (d) 11 U.S.C. § 362(a);
- (e) U.S. S.Ct. Rule 17.1;
- (f) Nevada Rule of Civil Procedure 60(b);

- (g) Nevada Rule of Appellate Procedure 27(c);
- (h) Nevada Supreme Court Rules 47 and 123;
- (i) Nevada Revised Statutes 125.020 and 199.120.

STATEMENT OF THE CASE

Respondent FRANK MORRISON SPILLANE, aka MICKEY SPILLANE (hereinafter MICKEY), respectfully provides the Court with the following background information avoided in the Petition for Writ of Certiorari filed by SHERRI SPILLANE (hereinafter SHERRI).

MICKEY is known as one of the world's greatest writers, having authored several books with more than one hundred million copies having been sold throughout the world. His creation, Mike Hammer, Private Detective, has been featured in several films and was the subject of a television production entitled The Return of Mike Hammer.

MICKEY and SHERRI were married in Malibu, California in November, 1964. The parties resided together for only about one-half of their nineteen year marriage. Their "long distance" marriage ended on April 7, 1983, when SHERRI procured a "quickie" divorce in Las Vegas, Nevada after she and MICKEY entered into a property settlement agreement. (This divorce is discussed below).

Nearly five years prior to the divorce, in May, 1978, while apart from SHERRI who resided in California, MICKEY entered into discussions concerning

television films based upon "Mike Hammer's" adventures. SHERRI initiated litigation in Nevada in 1984 alleging MICKEY's fraud, which was never proven. SHERRI never proved a contract for the "Mike Hammer" productions at the time of the April, 1983 divorce. The trial court observed:

MICKEY left all of the production and financial details to Jay Bernstein [the producer], insisting only upon four conditions:

- (1) The story would take place in New York City;
- (2) Mike Hammer would have short hair;
- (3) Mike Hammer's secretary would be a busty brunette; and
- (4) Mike Hammer would carry a .45 caliber automatic and not a 'sissy' .38 . . .

App.VIII, Decision, July 16, 1986, pp.2-3.

A. April, 1983: Petitioner's Uncontested Nevada Divorce And The Amended Divorce Decree.

In March, 1983, SHERRI, who resided

in Los Angeles, California, filed for Divorce in Clark County, Nevada. On April 7, 1983, SHERRI appeared in proper person, not being represented by counsel as permitted by law. Her resident witness was Cindy Dalessio of Clark County, Nevada. (By practice under Nevada Revised Statute 125.020, a party offers the testimony of a "resident" witness to verify the residency of the party seeking dissolution of the marriage.) SHERRI's case was called and the standard colloquy in an uncontested, in proper person divorce was conducted in open court after SHERRI and her resident witness swore to tell the truth, the whole truth, and nothing but the truth.

The late Robert Legakes, District Judge, questioned SHERRI, who responded in a cogent and coherent manner. Judge Legakes was satisfied that SHERRI was a resident of Clark County, Nevada, had been separated from MICKEY for over three years and that the distribution of property was fair and equitable under the circumstances. App. VIII, Decision, July 16, 1986, pp. 5-6. The Judge examined SHERRI's resident witness who swore that SHERRI was a bona fide resident of Clark County, Nevada. SHERRI was awarded an absolute decree of divorce.

Minutes, after filing her Divorce Decree, SHERRI and her lover of several years, Michael Standing, were married in Las Vegas.

By a letter dated April 29, 1983 addressed to SHERRI at her Las Vegas address, Judge Legakes enclosed an Amended Decree of Divorce, explaining the action was taken to make the original Decree consistent with MICKEY's Answer in proper person.

B. August, 1984 to July, 1986: The Litigation Initiated By Petitioner To Challenge the Validity of the Divorce Decree.

On August 22, 1984, SHERRRI filed an independent lawsuit and a Motion to Set Aside a Decree of Divorce entered on April 7, 1983 pursuant to Rule 60(b) of the Nevada Rules of Civil Procedure. The Motion to Set Aside the Decree of Divorce was dismissed, as was the original Complaint. SHERRI amended her Complaint. All causes of action in the Amended Complaint were subsequently dismissed except the count alleging fraud.

On May 22, 1985, SHERRI appealed the trial court's decision denying the Motion to Set Aside the Decree. The case was docketed in the Nevada Supreme Court.

Trial on SHERRI's independent lawsuit encompassed a week long proceeding in July, 1986. The Honorable Myron E. Leavitt, District Judge, issued a detailed written Decision, finding that SHERRI was entitled to nothing. The trial court highlighted that "[SHERRI] had a fair opportunity to present her claims to the divorce court and MICKEY did nothing to prevent her from asserting her rights." App. VIII, Decision, July 16, 1986, p.13.

After the July, 1986 Decision, SHERRI's brother/attorney Martin Malinou, Esq., of the Rhode Island Bar, only admitted pro hac vice in Nevada, filed three post-trial motions without notices.

Later, Malinou scheduled the hearings for August 21, 1986. On August 21, 1986, the motions were taken off calendar because Malinou's airplane somehow "broke down" in Chicago. (Malinou later admitted that it was financially unfeasible for him to travel from Rhode Island to make all of the post-trial hearings which he set in the trial court.)

Subsequently, the post-trial motions were noticed for hearing on September 25, 1986. In the interim, SHERRI's Nevada counsel filed a Motion to Withdraw which was heard on September 23, 1986. Neither SHERRI nor her brother/attorney, Malinou, bothered to appear. The trial court

granted the Motion to Withdraw filed by SHERRI's Nevada counsel mandating that future consideration of SHERRI's post-trial motions was dependent upon whether Malinou associated with Nevada counsel. SHERRI's post-trial motions were rescheduled.

Again, neither Malinou nor SHERRI bothered to appear at the rescheduled hearing. No excuse was given for Malinou or SHERRI's absence. SHERRI and Malinou failed to procure associate Nevada counsel as ordered. The trial court denied the post-trial motions.

In October, 1986, the trial court revoked the authority of Malinou to represent SHERRI. That Order was due to Malinou's derelictions and refusals to comply with an order concerning his required association with Nevada counsel. Subsequently, Malinou's authority to practice before the Nevada Supreme Court was revoked because he neither associated with Nevada counsel nor requested permission to represent SHERRI at the Nevada Supreme Court. App. V, Order, 9/23/87, p.2.

C. August, 1986 to March, 1988: The Appeals Initiated By Petitioner And The Dismissal of These Appeals.

SHERRI filed a series of appeals to the Nevada Supreme Court. The Nevada Supreme Court considered these successive appeals filed in the eighteen month period from May, 1985 to October, 1986. The first appeal, filed in May, 1985, was dismissed on October 29, 1987 by an Order citing SHERRI's flagrant disregard of the Court's directives and appellate rules. App. VI, Order, 10/29/87, p.2.

On September 4, 1986, SHERRI's July 9, 1985 Appeal was dismissed and sanctions were imposed on SHERRI for bringing an Appeal labeled by the Nevada Supreme Court as grossly untimely and vexatious. However, the Nevada Supreme Court reluctantly permitted SHERRI forty-five (45) days from September 4, 1986 within which to file an opening brief. App. II, Order, 9/4/86. No brief was ever filed. SHERRI was sanctioned \$500.00 to reimburse MICKEY but SHERRI has never complied with that Order.

By Order of the Nevada Supreme Court dated October 16, 1986, SHERRI's Nevada Appellate counsel was granted leave to withdraw. SHERRI was granted thirty (30) days within which to secure new Nevada counsel. App. IV, Order, 10/16/86. SHERRI

never complied with that Order. Next, the Nevada Supreme Court directed that Malinou "shall not to be allowed to represent appellant [SHERRI] in these matters unless and until he associates Nevada counsel and is granted permission to do so. Failure to retain counsel as ordered may result in the immediate dismissal of these appeals." App. IV, Order, 10/16/86, pp. 1-2. Malinou never complied with this Order.

On September 23, 1987, the Nevada Supreme Court highlighted:

We note that appellant has failed to comply with our order of September 4, 1986, issued in No. 16643, ordering her to pay respondent \$500.00 and to provide the clerk of this court with proof of such payment. The automatic stay entered by the Federal Bankruptcy Court pursuant to 11 U.S.C. § 362(a) does not apply to our order sanctioning appellant for conduct which occurred after she filed the bankruptcy petition. 'Proceedings or claims arising post petition are not subject to the automatic stay.' . . .

Accordingly, appellant shall have thirty (30) days from the date of this order within which to make this payment and to provide the clerk of

this court with proof of such payment. Appellant's failure to pay this sum will result in the immediate dismissal of Docket No. 16643 and Docket No. 17584.

App. V, Order, 9/23/87, p3. (citations omitted).

Citing that at least one of SHERRI's appeals was more than two years old, the Nevada Supreme Court found SHERRI's actions inexcusable and ordered her to immediately procure counsel, and to file a brief and a record on appeal. App. V, Order, 9/27/87, p.4. SHERRI never complied with this Order.

On October 29, 1987, after several warnings were given to SHERRI noting her delaying tactics and inexcusable procrastination would no longer be tolerated, the Nevada Supreme Court dismissed SHERRI's appeals. App. VI, Order, 10/29/87.

The Nevada Supreme Court commented that after SHERRI's previous counsel withdrew in October, 1986, SHERRI was ordered to procure Nevada counsel. Nearly one year later in September, 1987, SHERRI was once again permitted thirty (30) days within which to secure Nevada counsel. SHERRI failed to comply with each of these Orders. The Order noted that "the record

in these appeals reveals that appellant [SHERRI] has repeatedly employed tactics of delay and has failed in several instances to comply with our orders." App. VI, Order, 10/29/87, p.2, fn.1.

ARGUMENT IN OPPOSITION TO PETITIONER'S
"REASONS" FOR GRANTING THE WRIT OF
CERTIORARI

I.

REVIEW BY CERTIORARI WILL WASTE
JUDICIAL RESOURCES BY CONSIDERING
NEVADA SUPREME COURT ORDERS WHICH
SANCTIONED THE PROCEDURAL DEFAULTS AND
ABUSES OF NEVADA'S APPELLATE PROCESSES
BY PETITIONER AND HER COUNSEL

The "reasons" offered in support of the issuance of the Petition are without merit. In the section, "Reasons for granting the Writ," SHERRI suggests that divorce litigants, even in uncontested proceedings, should be afforded legal counsel at State expense so that the court having jurisdiction over the divorce will somehow satisfy itself of the propriety of the dissolution proceeding and protect such litigants from their own infirmities or incompetence. Next, SHEFRI asserts that the Nevada Supreme Court sidestepped its authority by entering orders in what is considered to be a violation of the automatic stay provisions contained in 11 U.S.C. § 362(a). Then, analogy is drawn to a decision of the Utah Supreme Court in Rogers v. Rogers, 671 P.2d 160 (Utah 1983) to create a nonexistent "conflict" between the Utah reported decision and Nevada Supreme Court unpublished orders

disposing of SHERRI's successive and vexatious appeals. Certiorari should not be granted because any review will waste judicial resources by considering Orders which sanctioned the procedural defaults and abuses caused by SHERRI and her counsel.

A. The "Questions" Raised Are Not Sufficiently Important To Warrant Certiorari.

Preliminarily, no "issue" raised by SHERRI meets any standard in United States Supreme Court Rule 17.1. Each of the challenged, unpublished Orders of the Nevada Supreme Court are based upon adequate and independent State grounds. As such, the bases for these Orders are rooted in Nevada Procedure and substantive law, involving no important question to be decided by this Court. See Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Black v. Cutter Laboratories, 351 U.S. 292, 298 (1956); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ([Certiorari] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.")

The Orders disposing of and dismissing SHERRI's Appeals do not rest on

federal grounds. The Orders are based upon Nevada Appellate Rules, decisional authority, and the inherent power of the Nevada Supreme Court to control matters presented for its review. The suggestion that these Orders violated due process and Section 362(a) of Title 11, United States Code -- the bankruptcy automatic stay -- is but an impassioned, last-ditch effort, to salvage a case documented by delaying tactics and a history of abuses. Now, SHERRI attempts to make a "federal case" out of isolated instances in the record through arguments which avoid any meaningful discussion of the reasons why the Nevada Supreme Court dismissed SHERRI's Appeals. In a nutshell, this is the "case of the missing case."

To support Certiorari, a question must be real and substantial. See Zucht v. King, 260 U.S. 174, 176 (1922).

A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants.

Rice v. Sioux City Memorial Park Cemetery,
349 U.S. 70, 74 (1955).

Federal questions cannot be fabricated nor based upon incomplete, selective, and synthesized recitals from a clear record which demonstrates that SHERRI is not entitled to certiorari because she failed to comply with clear orders and established Appellate Rules.

If an alleged aggrieved party -- such as SHERRI -- fails to comply with prescribed modes of perfecting appeals or has willfully failed to comply with the directives of an appellate tribunal, then certiorari is unavailable especially where the litigant was afforded an opportunity to comply with such rules and directives. See generally, Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 194-195 (1925); Hammerstein v. Superior Court of Calif., 341 U.S. 491, 492-493 (1951); Phyle v. Duffy, 334 U.S. 431, 439-440 (1948) (Certiorari is unavailable to review whether a state procedure deprives one of due process if the petitioner has not properly invoked a state remedy to have this matter determined.)

Indeed, if a state court order dismissing an appeal is based upon the failure to conform to state rules of practice and procedure, neither that order nor the underlying trial court judgment will sustain certiorari jurisdiction. Cf. Newman v. Gates, 204 U.S. 89, 95 (1907).

Nor would any review of the "questions presented" serve a legitimate public interest as distinguished from a false significance attached by SHERRI. This Court has long held that the invocation of certiorari is rooted in a decision that the question is of considerable importance to the public as distinguished from any importance attached by a particular litigant. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). The discretion to issue the Writ should not be invoked because none of SHERRI's questions present any issue of national importance. This request is but another demonstration of SHERRI's frustration with the outcome of her ill-fated case. The Petition should be denied.

B. The Nevada Supreme Court Orders Did Not Violate Due Process.

1. The October 16, 1986 Order Permitting Petitioner's Licensed Nevada Attorney to Withdraw Was Proper.

This Order permitted SHERRI's Nevada counsel to withdraw as counsel of record. App. IV, Order, 10/16/86. That Motion was opposed by SHERRI, citing that the automatic stay provisions in 11 U.S.C. § 362(a) were applicable. SHERRI fails to

advise this Court that the automatic stay prevents actions initiated against the debtor but does not stay actions pursued by the debtor, a distinction of considerable importance.

The October 16, 1986 Order contained an additional challenged directive that SHERRI procure qualified Nevada counsel to represent her interests. This Order rescinded the authority of Martin Malinou, Esq., -- SHERRI's brother and attorney before this Court -- from practicing in Nevada unless and until he associated with Nevada counsel and was granted permission to do so. Neither SHERRI nor Malinou ever complied with this directive.

SHERRI additionally argues that a single Justice of the Nevada Supreme Court granted the Motion for Leave to Withdraw as Counsel of Record filed by SHERRI's then Nevada counsel. A similar argument is advanced concerning the October 30, 1986 Order issued by a panel of three Justices. These Orders were entirely appropriate as authorized by Rule 27(c) of the Nevada Rules of Appellate Procedure, purely matters of Nevada concern.

2. The September 23, 1987
Order Was Proper Because The Nevada
Supreme Court Was Under No
Duty To Appoint Counsel For
Petitioner, A Civil Appellant.

SHERRI claimed a near right to have Nevada counsel appointed to represent her before the Nevada Supreme Court. On December 11, 1986, MICKEY opposed SHERRI's Motion for Appointment of Counsel by the Nevada Supreme Court citing three grounds which strongly support denial of certiorari. First, SHERRI was unworthy of being afforded appointed counsel by the Nevada Supreme Court and, even if the Court was to recognize the availability of such relief in extraordinary civil cases, this case was not a case for appointed counsel. Second, SHERRI admitted in trial court proceedings that she had access to and consultations with attorneys shortly before the time she procured her divorce in April, 1983. Third, SHERRI was never denied meaningful access to the courts of the State of Nevada and, more particularly, was never denied a full and fair opportunity to present her claims in her in proper person divorce and at all stages of her subsequent litigation to set aside the decree of divorce.

Certiorari is unwarranted under these circumstances to consider whether an

uncontested divorce litigant is entitled as a matter of federal constitutional law to have state appointed counsel. The staggering costs and potential drain on the judicial and legal resources of states is evidence enough to preclude certiorari due to the financial impact which such a rule of federal constitutional law would have upon matters of purely local concern. Cf. National League of Cities v. Usery, 426 U.S. 833 (1976).

An identical issue was presented to the New York Court of Appeals In the Matter of Smiley, 330 N.E.2d 53, 55, 369 N.Y.Supp. 2d 87, 90 (1975) where the issue was "[w]hether an indigent Plaintiff wife in a divorce action and an indigent Defendant wife in a similar action are entitled, as a matter of constitutional right, to have the county . . . provide them with counsel or compensation for counsel retained by them." The Smiley court resolved the issue against court-appointed counsel for divorce litigants citing that the judiciary lacked power to compel the expenditure of public funds absent a statutory authorization.

There is nothing in the Nevada Supreme Court Orders evidencing a denial of due process by the refusal of the Nevada Supreme Court to appoint appellate counsel for SHERRI, a civil appellant. In this fashion, the Nevada Supreme Court

correctly ruled that SHERRI was not entitled to appointment of counsel. App. V, Order, pp.1-2. There is no further basis to consider this state court determined issue.

3. The October 29, 1987 Order Dismissing Petitioner's Appeals Was Proper.

The Nevada Supreme Court's Order dated October 29, 1987 did not violate due process. The Order constitutes "state action" but not every incident of "state action" constitutes a violation of due process and certainly not every incident of "state action" requires this Court to grant certiorari.

SHERRI analogizes a strongly worded Order as a violation of due process when, in fact, the October 29, 1987 Order was precipitated by self-imposed procedural defaults and by a refusal to secure Nevada counsel. After several warnings were issued noting that delaying tactics and inexcusable procrastination would no longer be tolerated, the Nevada Supreme Court correctly dismissed SHERRI's Appeals. App. IV, Order, 10/29/87, pp. 1-2.

This Court has held that certiorari is unavailable to review whether a state

procedure deprives one of due process if the alleged aggrieved party fails to properly invoke state remedies to have the matter determined. Compare, Phyle v. Duffy, 334 U.S. 431, 440-442 (1948) and Newman v. Gates, 204 U.S. 89, 95 (1907). Accordingly, the Petition should be denied.

C. The Nevada Supreme Court Orders Did Not Violate Section 362(a), Title 11 United States Code.

The Petition asserts in several instances that the October 16, 1986, October 30, 1986, September 23, 1987 and October 29, 1987 Orders violated 11 U.S.C. § 362(a), the bankruptcy automatic stay. This argument is without merit and certainly presents no basis for granting certiorari.

First, 11 U.S.C. § 362(a) stays proceedings against debtors. Second, 11 U.S.C. § 362(a) has been decided with some degree of unanimity not to stay actions initiated by debtors even if the results of such actions would benefit the estate. Compare, Association of St. Croix Condominium Owners v. St. Croix Hotel, 682 F.2d 446, 448 (3rd Cir. 1982) and In Re Convention Masters, Inc., 46 B.R. 339 (Bankr. D.Md. 1985). Third, because all actions in the Nevada courts were brought by SHERRI to "enforce" what she believed

to be her rights, there was no action against SHERRI to be stayed. Fourth, SHERRI's furtive attempt to "create" a conflict between unpublished Nevada Supreme Court Orders and a Utah decision, Rogers v. Rogers, 671 P.2d 160, 162-3 (Utah 1983), must fail in two respects. Unpublished Nevada Supreme Court Orders cannot be cited as legal authority. Nevada S.Ct. Rule 123. Next, the complaining litigant in Rogers, supra, was the defendant in the divorce action so that proceeding was an action against a debtor who did not initiate a state court action. This Petition should be denied.

II

THERE IS NO BASIS FOR EXERCISING
CERTIORARI JURISDICTION TO REVIEW THE
CLAIM THAT PETITIONER WAS DENIED DUE
PROCESS ON THE THEORY THAT HER APPEALS
COULD NOT BE DISMISSED

Misconstruing Nevada S.Ct. Rule 47, SHERRI asserts that MICKEY was required to give notice of the appointment of an attorney for a party appearing in proper person. An identical argument was rejected by the Nevada Supreme Court. This Rule provides:

Rule 47. Death or removal of attorney: Appointment of another attorney or appearance in proper person. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney shall, before any other proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

This Rule applies only when a party to an action is required by written notice by the adverse party to appoint another attorney or to appear in person. This Rule does not create an affirmative duty of an adverse party to issue a notice but only when the adverse party desires that the unrepresented person should act with the advice of counsel or in proper person. Next, this Rule does not prevent the Nevada Supreme Court from sanctioning parties who appear in proper person. In any event, the Nevada Supreme Court actually ordered SHERRI to secure new Nevada counsel. Therefore, this is a non-issue in that MICKEY was not required, unless he elected to do so, to file a notice demanding that SHERRI be represented by counsel or represent her own interests, pursuant to Supreme Court Order. In this regard, Petitioner's statement on page 10 of the Petition that

"[t]he Nevada Supreme Court never gave Petitioner the choice of appearing in person" is false in that the Nevada Supreme Court directed SHERRI to secure counsel because that tribunal would not permit SHERRI to represent her interests. Suffice it to say, the challenged Orders were valid exercises of the jurisdiction of the Nevada Supreme Court. The Petition should be denied.

III

THERE IS NO STATUTORY OR SUBSTANTIVE
CERTIORARI JURISDICTION TO REVIEW THE
PROPRIETY OF AN APRIL, 1983 UNCONTESTED
"QUICKIE" DIVORCE PROCURED BY PETITIONER

A. Any Review of the April, 1983
Divorce Decree Is Time Barred.

The Petition asks this Court to review whether or not the divorce court, in April, 1983, some sixty-three months ago, failed to satisfy itself of the fairness of the property distribution in a "quickie" divorce proceeding. Despite its substantive flaws this issue is time barred.

Section 2101(c) of Title 28, United States Codes provides:

(c) Any other appeal or any writ of certiorari intended to bring any

judgment or decree in a civil action, suit or proceedings before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

The issue is not reviewable because the uncontested divorce proceeding occurred on April 7, 1983 more than ninety (90) days ago and there was no extension of time granted by this Court within which SHERRI may have applied for certiorari. The Petition should be denied.

B. Certiorari to Review a Trial Court Decree, from Which an Appeal Was Not Timely Exhausted, Is Unavailable.

The Divorce Decree was not immediately appealed. If a judgment of a trial court is subject under state law to review by an appellate court, such review must be sought. Minneapolis, St. Paul & SSM R.R. Co. v. Rock, 279 U.S. 410 (1929); Virginian R.R. Co. v. Mullins, 271 U.S. 220 (1926). See also, 28 U.S.C. § 1257. In the instant case, the dismissal of SHERRI's appeals was based upon her failure to perfect appeals

by her refusals to conform to Nevada Rules of Practice and to obtain Nevada counsel. SHERRI had an appeal remedy in April, 1983 which was not exhausted. There is no certiorari jurisdiction to review this issue given SHERRI's opportunity to fully and fairly litigate an appeal in a timely fashion but, due to her own delays, procrastinations, and outright defiance, her claims were properly disposed of by the Nevada Supreme Court.

C. Certiorari Should Not Be Granted To Review A "Quickie" Divorce Procured Through Petitioner's Probable Perjury.

As a discretionary writ, certiorari should be reserved for the most compelling cases of national importance. The writ should not be issued to those who come into a state court system with "unclean hands" only to later challenge and openly defy those same procedures.

In his Decision, App. VIII, pp. 12-13, Judge Leavitt found:

SHERRI may have committed perjury when she testified that it was her intention to make Nevada her home (NRS 199.120). She may have

committed subornation of perjury by requesting Cindy Dalessio to testify as her resident witness and state to the court that she had seen SHERRI in Clark County, Nevada, several times every day during the six months prior to the divorce, which was an obvious falsehood.

Based upon these established facts and conclusions, the Petition should be denied.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CHARLES E. THOMPSON, ESQ.*
DONALD J. GREEN, ESQ.^o
THOMPSON & HARPER, LTD.
703 South Eighth Street
Las Vegas, Nevada 89101
(702) 382-3652
Attorneys for Respondent

* Counsel of Record

^oOn the Brief

-----0-----
Corey H. Jenkins, a student at Willamette Law School, provided valuable legal research in the preparation of this Brief.



APPENDIX IX

RELEVANT CONSTITUTIONAL PROVISIONS
STATUTES AND RULES OF COURT INVOLVED

(a) U.S. Const. amend, XIV:

Section 1. Citizenship: privilege and immunities; due process; equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b) 28 U.S.C. § 1257:

§ 1257. State courts; appeal certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

(c) 28 U.S.C. § 2101(c):

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) 11 U.S.C. § 362(a):

§ 362 Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(e) U.S. Supreme Court Rule 17.1:

Rule 17. Considerations governing review on certiorari.

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons

therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. . . .

(f) Nevada Rule of Civil Procedure
60(b):

Rule 60. Relief from judgment or order.

(b) Mistakes; inadvertence; excusable neglect; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; . . . The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to

set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(g) Nevada Rule of Appellate Procedure 27(c):

Rule 27. Motions.

(c) Power of a single justice to entertain motions. In addition to the authority expressly conferred by these rules or by law, a single justice of the Supreme Court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice may not dismiss or otherwise determine an appeal or other proceeding, and except that the Supreme Court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice may be reviewed by the court.

(h) Nevada Supreme Court Rules
47 and 123:

Rule 47. Death or removal of attorney; appointment of another attorney or appearance in person.

When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney shall, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Rule 123. Citation to unpublished opinions and orders.

An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; or (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding.

(i) Nevada Revised Statutes
125.020 and 199.120:

125.020. Verified complaint; residence or domicile; jurisdiction of district court.

1. Divorce from the bonds of matrimony may be obtained for the causes provided in NRS 125.010, by verified complaint to the district court of any county:

- (a) In which the cause therefore accrued;
- (b) In which the defendant resides or may be found;
- (c) In which the plaintiff resides;
- (d) In which the parties last cohabited; or
- (e) If plaintiff resided 6 weeks in the state before suit was brought.

2. Unless the cause of action accrued within the county while the plaintiff and defendant were actually domiciled therein, no court has jurisdiction to grant a divorce unless either plaintiff or defendant has been resident of the state for a period of not less than 6 weeks preceding the commencement of the action.

199.120. Definition; penalties.

Every person, having taken a lawful oath or made affirmation in a judicial proceeding or in any other matter where, by law, an oath or affirmation is required and no other penalty is prescribed, who:

1. Willfully makes an unqualified statement of that which he does not know to be true;

2. Swears or affirms willfully and falsely in a matter material to the issue or point in question;

3. Suborns any other person to make such an unqualified statement or to swear or affirm in such a manner;

4. Executes an affidavit pursuant to NRS 15.010 which contains a false statement, or suborns any other person to do so; or

5. Executes an affidavit or other instrument which contains a false statement before a person authorized to administer oaths or suborns any other person to do so,

is guilty of perjury or subornation of perjury, as the case may be, and shall be punished by imprisonment in the state

prison for not less than 1 year nor more than 10 years, and may be further punished by a fine not more than \$10,000.